Supreme Court of the United States

OCTOBER TERM, 1922

No. 934

FRANCISCO BIANCHI and ROSARIO B. DE ESTEVE,
Complainants-Appellants,

against

MANUEL MENDIA MORALES, AND OTHERS,
Defendants-Appellees.

Appeal from the District Court of the United States for Porto Rico

MOTION TO AFFIRM, OR ADVANCE, OR VACATE STAY

CARROLL G. WALTER,
Counsel for Appellees.
120 Broadway, New York.

Supreme Court of the United States,

OCTOBER TERM, 1922.

FRANCISCO BIANCHI and ROSARIO B. DE ESTEVE, Complainants-Appellants, *against* MANUEL MENDIA MORALES, JUAN B. ARZUAGA GONZALEZ, MIGUEL MOCOROA ARZUAGA, JUAN JOSE ARZUAGA BERAZA, JOSE MARIA ARZUAGA BERAZA, CEFERINO ARZUAGA, and EUGENIO MURUA PENA-GARIGANO, doing business under the firm name of SOBRINOS DE EZQUIAGA, and the BANK OF NOVA SCOTIA, Defendants-Appellees.	No.

APPEAL FROM DECREE OF DISTRICT COURT OF UNITED STATES FOR PORTO RICO DISMISSING BILL FOR WANT OF JURISDICTION—TAKEN ORIGINALLY TO CIRCUIT COURT OF APPEALS FOR FIRST CIRCUIT AND TRANSFERRED TO THIS COURT UNDER ACT OF SEPTEMBER 14, 1922.

MOTION.

Now come the above named appellees and respectfully move this honorable Court,

1. To affirm the decree (under Subdivision 5 of Rule 6), upon the ground that the questions

involved are frivolous and the appeal was taken for delay only; *or*

2. To advance the cause for immediate hearing under Rule 32; *or*

3. To vacate the stay granted by the District Court pending the determination of the appeal on the ground that said stay was granted without jurisdiction and in violation of Section 265 of the Judicial Code and in abuse of discretion.

The following is a brief statement of the facts and matter involved and of the reasons for the application:

In September, 1922, the appellees commenced proceedings in one of the insular courts of Porto Rico to foreclose a mortgage for $129,881.13 upon real estate owned by a co-partnership of which the appellants are members (Rec., p. 7). The appellants thereupon brought a suit in another insular court to rescind and annul the mortgage (*id.*, p. 8). Being unable, under the local law, to enjoin the foreclosure proceedings (*id.*, p. 8), they then filed a bill in the United States District Court for Porto Rico to enjoin the prosecution of the foreclosure proceedings "until the termination of the suit filed in the local courts by your orators for the setting aside of the above mentioned contracts and mortgage deed" (*id.*, p. 9). *An injunction is the only relief prayed for.*

The bill shows that the appellees were the holders of a promissory note of the appellants' firm (Rec., pp. 5, 5); that they filed a suit in the insular court "directly against the firm" to recover upon the note (*id.*, p. 6); that an agreement of settlement was then made whereby the firm was to buy certain stock from the appellees and give a mortgage to secure payment of the stipulated

price (*id.*, pp. 6, 7), the agreement being signed on behalf of the firm by the same attorney who afterwards filed the bill for the appellants (*id.*, p. 14); *that the contract of settlement was submitted to the court in which the suit upon the note was pending and upon motion of both parties the court entered a judgment sanctioning the agreement and commanding both parties to adhere to and execute the same* (*id.*, pp. 11, 14). The bill further avers that both the note and the agreement of settlement and the mortgage were given by one of the partners "without authority" (*id.*, pp. 5-7), but the allegation is made *purely by way of conclusion, without the averment of any supporting facts.* There is no averment that the attorney who signed the agreement and consented to the judgment was not authorized so to do, nor is it suggested that the judgment was improperly obtained or is invalid or not binding. Neither is there any offer to return the stock received for the mortgage or any averment that the appellants are in a position to return it.

The District Court, on January 5, 1923, dismissed the bill for want of jurisdiction (*id.*, pp. 33-39, particularly 35, 39). The complainants appealed to the Circuit Court of Appeals for the First Circuit (*id.*, pp. 41, 42); and the District Court, on January 9, 1923, granted a stay of the foreclosure proceeding "for ninety days from this date or until such action as may be taken by the Court of Appeals at Boston" (*id.*, pp. 42, 46).

The case was argued in the Circuit Court of Appeals, and on March 15, 1923, that court, of its own motion, transferred the appeal to this court under the Act of September 14, 1922 (Judicial Code, §238a, 42 Stat., 837), upon the ground that inasmuch as the bill was dismissed for want of

jurisdiction the appeal should have been taken directly to this court under Section 238 of the Judicial Code.

I.

The granting of the only relief prayed in the bill is expressly prohibited by Section 265 of the Judicial Code, and for that reason the appeal is frivolous.

Section 265 of the Judicial Code (formerly Section 720 U. S. Rev. Stat.) provides:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any Court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The conditions under which Federal Courts, despite that provision, may issue injunctions were carefully enumerated in *Wells Fargo & Co.* vs. *Taylor,* 254 U. S., 175. A bare inspection of the bill demonstrates that none of those conditions exists here. There is no previously-acquired Federal jurisdiction to be protected or enforced, and the bill for injunction was filed after the commencement of the proceeding sought to be enjoined and before its termination.

The case at bar is completely controlled by *Essanay Film Co.* vs. *Kane,* 258 U. S., 358, in which this court specifically asserted (p. 361):

> "That appellants' objection to the action sought to be restrained rests upon a fundamental ground and one based upon a

provision of the Constitution of the United States, does not render the effort to stay proceedings in the State Court any the less inconsistent with Section 265, Judicial Code."

That Section 265 applies to Porto Rico (i. e., that it prohibits the Federal Court in Porto Rico from enjoining proceedings in the insular courts) is clear, not only from the character and purpose of the statute, but, also, from the provisions of Section 1891 of the United States Revised Statutes and Section 14 of the Organic Law of Porto Rico of 1900 and Section 58 of the Organic Law of Porto Rico of 1917. By those statutes all laws of the United States "not locally inapplicable" are declared to be in force in Porto Rico and all organized Territories.

II.

There is neither citizenship nor Federal question sufficient to support jurisdiction, and for that reason, also, the appeal is frivolous.

There is no allegation that all the parties on either side of the controversy are not domiciled in Porto Rico, and hence the citizenship requisite to confer jurisdiction is wanting.

Porto Rico Ry., L. & P. Co. vs. *Mor*, 253 U. S., 345;
Vere vs. *Bianchi*, 266 Fed., 367.

An attempt is made to present a Federal question by the allegation that a sale of the property

in the foreclosure proceeding before the appellants' suit for rescission of the mortgage is determined will deprive them of their property without due process of law (Rec., pp. 8, 9). But the question thus suggested is *too frivolous and unsubstantial to confer jurisdiction.*

> *Underground Railroad* vs. *New York*, 193 U. S., 416;
> *Newburyport Water Co.* vs. *Newburyport*, 193 U. S., 561, 576;
> *Ramapo Water Co.* vs. *New York*, 236 U. S., 579.

In the first place, the bill does not show that the appellants have a *right* to have the mortgage rescinded. On the contrary, it appears upon the face of the bill that they are estopped by judgment from attacking the validity of the mortgage.

> *White* vs. *Crow*, 110 U. S., 183, 187, 188;
> *Crouse* vs. *McVickar*, 207 N. Y., 213, 217-219.

But even if the bill be construed as presenting a question as to the constitutionality of the Mortgage Law of Porto Rico, that question is not sufficient to sustain jurisdiction because it is *wholly without merit.*

The constitutionality of the Porto Rican system of mortgage foreclosures was sustained by the Supreme Court of Porto Rico in *Gimenez* vs. *Drenes*, 10 Porto Rico, 124, in which that court said (p. 132):

> "It has also been affirmed that the summary proceedings for the recovery of mortgage debts is in opposition to the constitutional provision that no person shall be de-

> prived of life, liberty, or property, without due process of law.
>
> "This argument is without strength and we think its supporters will be few."

In *Torres* vs. *Lothrop*, 231 U. S., 171, this court appears to have taken special pains to shut off further controversy over the point by asserting the frivolousness of the contention. In that case the question was argued at some length (p. 172), and although the question was not technically open, Chief Justice WHITE, speaking for a unanimous court, took occasion to say (p. 177):

> "The summary or executory process provided by the mortgage law, which was followed in foreclosing the Torres mortgage, it is insisted was so deficient in notice or so wanting in opportunity to defend as to cause that law to be repugnant to the due process clause of the Constitution of the United States. Without pausing to apply the elementary doctrine that the due process clause does not control the mere forms of procedure provided only the fundamental requirements of notice and opportunity to defend are afforded (*Louisville & Nashville Railroad Co.* vs. *Schmidt*, 177 U. S., 230), and *without stopping to indicate how clearly these fundamental rights were provided for as demonstrated by the facts which we have enumerated*, we think it suffices to say that it does not appear that the contention of want of due process was urged either upon the trial court, or was assigned as error in the court below, or was passed upon by that court. And as in its opinion in this case concerning another subject the court below pointed out that it was without authority to consider errors complained of which were not presented to the trial court, it follows that in any view, it could not be

held that the court below erred in deciding a matter which it did not decide and which it had no authority to pass upon."

A casual reading of Articles 127 to 134 of the Mortgage Law and of Articles 168 to 175 of the Mortgage Law Regulations will demonstrate the soundness of that conclusion. Briefly stated, the Law and the Regulations taken together require that the mortgagee present to a court proof of his capacity to sue and of his ownership of the mortgage and of its non-payment. Notice to the debtor must be given, and he is allowed to prove payment and is also given an opportunity to pay before a sale is had. All claims and defenses other than payment may be presented and heard *"in the proper plenary action,"* whether those claims be by the debtor or by third persons in possession or by other persons interested (Regulations, Art. 175). It is true that these other claims are not permitted to delay the sale, but provision is made that the mortgagee cannot get his money until the claims are determined if the judge thinks that course is proper (Idem.) *Obviously, therefore, there is both notice and an opportunity to be heard and an opportunity to present all claims.*

It is true that in some cases the land may be sold before the claims asserted in the plenary action are determined, but in that plenary action the plaintiff may file a *lis pendens* or "cautionary notice" and that is sufficient for his protection.

Romeu vs. *Todd*, 206 U. S., 358;
American Trading Co. vs. *Monserrat*, 18 P. R., 268.

See, also,

Mortgage Law, Sec. 42;

Mortgage Law Regulations, Sec. 91;
Code, Civ. Proc., Sec. 91.

Those cases and statutory provisions clearly demonstrate that, in suits of the character of the one brought by the appellants in the insular court to rescind the mortgage, the local law of Porto Rico authorizes the filing of a "cautionary notice" (similar to the *lis pendens* or notice of pendency of action generally provided for in perhaps all the States of this Union), the effect of which is to make the title of a subsequent purchaser subject to the result of the litigation; and it is because the filing of such a cautionary notice affords a complete and adequate remedy that the courts of Porto Rico refuse to enjoin mortgage foreclosure proceedings for any reason except the reasons expressly set forth in Section 175 of the Mortgage Law Regulations.

In *American Trading Co.* vs. *Monserrat, supra,* it was argued that prior decisions holding that a mortgage foreclosure proceeding could not be enjoined were not applicable after the enactment of the Injunction Law of 1906, but the court held otherwise and expressly stated (pp. 271, 272):

> "Moreover, we do not think it was the intention of the Legislature to permit a debtor to do by way of injunction what he could not otherwise do, namely, suspend a summary proceeding. *His remedy is by way of an ordinary suit with a cautionary notice in the Registry of Property.*"

It appears, therefore, that looking at the matter in the light most favorable to the appellants, they have a complete and adequate remedy by the simple device of filing their cautionary notice with the Registry of Property.

It necessarily follows that there is no denial

of due process of law and even no need for the interposition of equity.

To say that the Mortgage Law of Porto Rico is unconstitutional because it does not permit any defense other than that of payment to be interposed in the foreclosure proceeding is about as sensible as saying that our own common law system of procedure is unconstitutional because it does not permit the interposition of equitable defenses in actions at law.

The system of mortgage foreclosures prevailing in Porto Rico is of ancient origin. It is in general accord with the system prevailing in all civil-law countries. The policy of Congress has been to preserve to the people of that island the system of local law to which they have been accustomed (*Romeu* vs. *Todd*, 206 U. S., 358, at p. 369), and, on the other hand, Congress has been sedulous to avoid forcing upon those people some institutions that we regard as the palladium of our liberties (*Balzac* vs. *Porto Rico*, 258 U. S., 298, 310, 311). Consequently, a law that prevailed in that island long prior to its cession to the United States would have to be most outrageously shocking to our notions of justice before it could be said that due process of law in Porto Rico requires the up-setting of its long-established institutions.

The Fourteenth Amendment carries no mandate for procedural reforms (*Ownbey* vs. *Morgan*, 256 U. S., 94, 112), and our courts have not been commissioned to remodel the civil law according to common law conceptions (*Diaz* vs. *Gonzalez*, decided Feb. 19, 1923).

Finally, it is to be noted that the whole sum and substance of the appellants' grievance is that they claim that one of their partners exceeded his authority. It could not be said to be a denial

of due process of law if no remedy at all as against third persons were provided for such a case. So far as the Constitution is concerned, it would be within the competency of any State to provide that the members of a firm should themselves take the risk of one of the members going further than they thought he ought, *i. e.*, that they should be bound by all his dealings with third persons and should be confined to an action against him for any damage they might suffer as a result of his violation of the partnership agreement.

III.

The case made by the appellants in support of their application for injunction is so patently inadequate and so entirely devoid of merit as to make the granting of the stay an abuse of discretion.

The incongruity of the action of the District Court in denying that it had jurisdiction to do a thing and then doing the very thing which it had decided it had no power to do is manifest.

Aside, however, from the question of jurisdiction, it was an abuse of discretion to grant the stay because it is apparent that the appellants cannot suffer any irreparable injury. As already pointed out, immediately upon bringing their suit to rescind the mortgage the appellants could file a cautionary notice or *lis pendens* in the Registry of Property.

Code of Civil Procedure, §91;
Mortgage Law, §42;
Mortgage Law Regulations, §91

And it has been specifically held by the Supreme Court of Porto Rico that the filing of such a notice affords an adequate remedy.

> *American Trading Co.* vs. *Monserrat*, 18 Porto Rico, 273.

The fact that the bill shows upon its face an *estoppel by judgment* is a further reason why the stay should not have been granted.

Still further, and coming to the actual merits of the appellants' case, we find an utter lack of that state of facts which always is necessary to move a court of equity to the granting of relief by way of injunction.

The sole and only ground asserted as a basis either for the rescission of the mortgage or for the injunction sought in this suit is that Juan Bianchi, who is described as "one of the managing partners of Sucesores de Bianchi" was "without power or authority by the articles of co-partnership" to give the mortgage and that he gave it "entirely without power or authority because of the articles of partnership and without the consent or knowledge of the complainants" (Rec., pp. 4, 5). In addition to those allegations the bill contains the following (*id.*, p. 5):

> "And your orators further allege that your orators had no knowledge or notice of the execution of said so-called mortgage deed, or of its recording in the Registry of Property, nor do the articles of partnership give to any of the partners of Sucesores de Bianchi the power to use the firm name to accommodate third parties, or to in any way secure negotiable paper, nor to execute mortgages upon the real estate belonging to the partnership, nor have your orators in any way given their consent to any and all of the aforesaid acts

> of the partner Juan Bianchi done entirely without their authority and exceeding his powers as said managing partner of the said Sucesores de Bianchi."

Those allegations, however, obviously are mere conclusions of the pleader, which are not admitted by the motion to dismiss (*Equitable Life Assurance Society* vs. *Brown*, 213 U. S., 25, 43; *United States* vs. *Ames*, 99 U. S., 45, 46), *and no facts are set forth to support them.*

The articles of co-partnership are not exhibited with the bill, no statement is given as to how the business of the partnership was actually carried on, and no showing is made as to the extent to which Juan Bianchi was held out to the public as having authority to act on behalf of the firm. In short, the appellants presented nothing but their own general assertion that Juan Bianchi was not authorized to do what he did. Whether or not he was authorized is a question depending upon many elements, and the burden was upon the appellants to show *facts* from which the court itself might draw its own conclusion as to whether or not the requisite authority existed.

On the other hand, it affirmatively appears that a suit was brought against the firm, and, as already stated, the mortgage was given as the result of an agreement of settlement made and entered of record as the judgment in that suit. There is no allegation of any lack of service of process in that suit. Presumptively, the process was regularly served, and it is expressly provided by statute that even where process is served upon only one member the judgment is binding upon all (Code, Civ. Proc., Sec. 73). The agreement, as we have stated above, was signed by "Cay Coll Cuchi, attorney for defendant" (Rec., p. 11)

That must mean attorney for the *firm* and there is no pretense or allegation that Cay Coll Cuchi was not authorized to sign the agreement.

In brief, therefore, we have this situation: The mortgage was given pursuant to an agreement of settlement of an action in which the firm was a defendant and represented by an attorney whose authority is unquestioned, and that agreement made the judgment of the court. Without returning or offering to return the consideration which the firm received for the mortgage, two members of the firm now come into court by the same attorney who made the agreement and allege, purely by way of conclusion, that the managing partner who signed the mortgage was without authority. The allegation of lack of authority is not supported by any proof whatsoever except the oath of one of the complainants who does not substantiate the conclusion to which he swears by reference to any facts whatsoever.

Such a showing as that is entirely too meager to justify any court in holding up the regular and ordinary procedure established by law for the collection of a mortgage debt.

Respectfully submitted,

CARROLL G. WALTER,
120 Broadway,
New York,
Counsel for Appellees.

March, 1923.

NOTICE OF MOTION.

SIRS:

Please take notice that the appellees will submit the foregoing motion at a stated term of the court to be held at the Capitol in the City of Washington on April 16, 1923, at the opening of court on that day or as soon thereafter as counsel can be heard.

Yours, &c.,

CARROLL G. WALTER,
Counsel for Appellees.
120 Broadway,
New York, N. Y.

To GEORGE W. STUDY, Esq.,
BOUVIER, CAFFEY & BEALE,
Counsel for Appellants.